A **STANISLAUS J VINCENT CROSS v. GANESAN VYRAMUTOO & ANOR**

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL APPEAL NO: BA-12B-99-06-2019]
B 10 JUNE 2020

TORT: *Defamation – Libel – Circumstantial evidence – Anonymous publication of words defamatory of complainant – Whether identity of tortfeasors established – Whether 'irresistible conclusion' test satisfied – Whether circumstances cogently and*
C *firmly established – Whether circumstances pointed towards commission of tort by alleged tortfeasors – Whether circumstances, taken cumulatively, formed complete chain that there was inescapable conclusion that tort was committed by alleged tortfeasors and none else*

D The appellant, an advocate and solicitor, acted for the MIC Caddies at the Sessions Court in a claim for damages against Kelab Golf Negara Subang ('KGNS'). A judgment was successfully obtained against KGNS for RM205,000 with interest. KGNS filed an appeal against the judgment and, according to the appellant, without any authority to negotiate, the MIC Caddies' General Manager ('second respondent') signed a letter agreeing to
E settle the matter for RM45,000, enclosing KGNS' cheque for such amount. Later, having received the settlement cheque for RM300,000, the appellant enclosed an invoice of RM94,000 in legal fees and held back the balance pending further appeal. At the appellant's insistence, the MIC Caddies signed an indemnity agreement to indemnify and save the appellant from any claim,
F action, liability, loss, damage, suit, report or complaint arising from the release of the judgment sum after the deduction of the fees and charges. Following this, complaints were lodged against the appellant lodged by (i) the first respondent, with the Advocates & Solicitors' Disciplinary Board; and (ii) the President of National Association of Caddies Malaysia ('Sulaiman'),
G with the Catholic Lawyers Society Kuala Lumpur, in connection with the appellant's handling of the judgment sum and fees. In the meantime, there were also anonymous publications of posters bearing words defamatory of the appellant. The appellant, believing the respondents to be the tortfeasors behind these defamatory posters, commenced an action at the Sessions Court,
H against the respondents, premised on the tort of defamation. The respondents denied their involvement. The Sessions Court dismissed the action and, hence, the present appeal.

Held (dismissing appeal with costs):

I **(1)** The appellant had to prove the identity of the tortfeasor of the anonymous publication. The test of proof of identity of the tortfeasor, in a case where the defendant has denied their involvement whatsoever and the plaintiff entirely relies upon circumstantial evidence to establish

the identity of the tortfeasor, is that of 'irresistible conclusion', except in a situation where a statute expressly provides to the contrary, such as the presumptions under s. 114A of the Evidence Act 1950, applied. The appellant had to prove: (i) the circumstances from which an inference of commission of tort was sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the commission of the tort by the respondents; and (iii) the circumstances, taken cumulatively, should form a chain so complete that there was no escape from the conclusion that within all human probability the tort was committed by the respondents and none else. (paras 13 & 14)

(2) While there were items of the circumstantial evidence which pointed towards the respondents, there were also items of circumstantial evidence which pointed towards persons other than the respondents as the likely persons who published or caused to be published the defamatory posters. Sulaiman and the relevant signatories, who signed the indemnity agreement in favour of the appellant, were not cited as a co-defendant nor called/subpoenaed to testify in court. In their absence, the items of circumstantial evidence did not point wholly or predominantly towards the single conclusion of the guilt of the respondents. The circumstances were not of a definite tendency, unerringly pointing towards the culpability of the respondents and the circumstances, taken cumulatively, did not form a chain so complete that there was an inescapable conclusion that, within all human probability, the tort of defamation was committed by the respondents and none else. (paras 19-21)

Case(s) referred to:

Asia Pacific Parcel Tankers Pte Ltd v. The Owners Of The Ship Or Vessel "Normar Splendour" [1999] 7 CLJ 213 HC ***(refd)***

Belhaven & Stenton Peerage [1875-1876] AC 279 ***(refd)***

Boniface v. SMEC Holdings Ltd [2006] NSWCA 351 ***(refd)***

Brijlal Prasad Sinha v. State of Bihar (1998) 4 Scale 25 ***(refd)***

Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***

Hamzah Abdul Majid v. Mohd Jalani Datuk Hj Mohd Sidek & Ors [2014] MLJU 1858 ***(refd)***

Harris v. DPP [1952] 1 All ER 1044 ***(refd)***

Mutual Life & Citizens' Assurance Company Ltd & Another v. Clive Raleigh Evatt [1971] AC 793 ***(refd)***

Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor [2016] 1 LNS 884 HC ***(refd)***

PP v. Cheah Chong Tatt & Anor [2017] 1 LNS 575 HC ***(refd)***

Quinn v. Leathem [1901] AC 495 ***(refd)***

Seymour v. ABC [1977] 19 NSWLR 219 ***(refd)***

Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

YB Dato' Hj Husam Hj Musa v. Mohd Faisal Rohban Ahmad [2015] 1 CLJ 787 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114A

Other source(s) referred to:
Sarkar's Law of Evidence, 15th edn, Reprint 2004, vol 1, pp 62-64

For the appellant - Francis Pereira & Pramod Nambiar; M/s Francis Pereira & Shan
For the respondents - Sandosh Ananda & Chen Joey; M/s Sandosh Anandan

Reported by Najib Tamby

JUDGMENT

Tee Geok Hock JC:

[1] An advocate and solicitor's diligence and industry in rendering his legal professional services have not been appreciated by his clients. Instead, he has to face his clients' complaint of alleged misconduct before a disciplinary tribunal of his legal profession. Worst of all, added to his saga and ordeal were some anonymous publications of posters which are defamatory of him in meaning and nature.

[2] In the present appeal, there is no dispute by the two respondents/defendants that the impugned words in the anonymous publications are defamatory in meaning and nature. The core defence of the respondents/defendants in the present appeal is that they deny that the publications were made by them and it is their submission that the appellant/plaintiff has failed to prove the publications were made by the respondents/defendants.

[3] In the present appeal, the appellant/plaintiff did not witness who prepared or put up the impugned posters, and the plaintiff has not called any eye witness to testify as to the identity of the tortfeasor(s). Hence, the plaintiff's case against the defendants being the alleged tortfeasors rests entirely on circumstantial evidence. This raises an important question of law as to what the plaintiff in the case of an anonymous publication of defamatory materials has to prove in order to succeed in his claim for damages against the defendants where the identities of the tortfeasors are to be established entirely by circumstantial evidence.

[4] On behalf of the plaintiff, learned counsel for the appellant referred to the following passages in the judgment of Mohamed Zaini Mazlan JC (as he then was) in *PP v. Cheah Chong Tatt & Anor* [2017] 1 LNS 575; [2017] MLJU 579:

> [64] There are no direct evidence to implicate Hafizuddin and Cheah. The prosecution had readily admitted that they are seeking to rely on the circumstantial evidences.
>
> [65] The most often quoted definition of circumstantial evidence was by Lord Cairns in *Belhaven & Stenton Peerage* [1875-1876] AC 279, where his Lordship stated:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[66] In *Chan Chwen Kong v. PP* [1962] 28 MLJ 307, Thomson CJ has this say on circumstantial evidence:

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted to make a rope.

[67] Lord Cairns and Thomson CJ's *dictum* were recently cited and relied by the Federal Court in *Pathmanabhan a/l Nalliannen* [2017] 4 CLJ 137 (FC).

[68] Circumstantial evidence is therefore the culmination of several evidences pieced together. On its own, each evidence would not be sufficient to conclude, but when pieced together, similar to pieces of a jigsaw puzzle being assembled, it provides a complete picture. This picture must point towards the guilt of the accused.

[5] The appellant's counsel in the appellant's written submission-in-reply, responding to the respondent's oral arguments, submitted that the test for circumstantial evidence would be as propounded in the case of *PP v. Cheah Chong Tatt & Anor* (*supra*) which would be equally applicable in this civil case before me. In the appellant's written submission-in-reply to the respondent's oral submission, learned counsel for the appellant cited the following passages from the judgment in *PP v. Cheah Chong Tatt & Anor*: "The most often quoted definition of circumstantial evidence was given by Lord Cairns in *Belhaven & Stenton Peerage* [1875-1876] AC 279 where His Lordship stated: "My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of which insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel". In *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] 1 MLJ 307, Thomson CJ has this to say on circumstantial evidence: "... where the evidence is wholly circumstantial what has to be considered in not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted to make a rope". The appellant's counsel further quoted the following passage from the judgment of the Supreme Court of New South

Wales Court of Appeal in *Boniface v. SMEC Holdings Ltd* [2006] NSWCA 351: "After a comparison of the various matters of commonality between the matters complained of, the primary judge concluded that there was material evidence which was capable of acceptance by the jury to establish that the appellant was responsible for publishing all nine matters complained of. Also that the probative force of circumstantial evidence necessarily must become greater as the individual items of evidence point plausibly towards the fact to be proved". Thus in *Seymour v. ABC* [1977] 19 NSWLR 219 at p. 234 per Mahoney JA: "... the probative force of circumstantial evidence may become greater as the individual items of evidence, each pointing, as Wigmore says, plausibly or probably towards the *fact probandum*, increase in number".

[6] It is the submission of the respondent's counsel that the test for establishing the identity of the tortfeasor is that of "irresistible conclusion". The position of the respondent on the test for circumstantial evidence is also supported by decided authorities cited by the respondent's counsel. The passages relied upon by the respondent's counsel on this point include:

(i) paragraphs [137] to [139] of the judgment of Lim Yee Lan J (later JCA) in *Hamzah Abdul Majid v. Mohd Jalani Datuk Hj Mohd Sidek & Ors* [2014] MLJU 1858 reproduce below:

> Finding on **circumstantial evidence**
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> [137] In regard to **circumstantial evidence** relied on by the Plaintiff, I agree with learned counsel for the Plaintiff that is not in dispute that a party to a legal proceeding, whether criminal or civil, is entitled to rely on both direct and **circumstantial evidence**, and in a case where there is no direct evidence, to rely entirely on **circumstantial evidence**, to prove its/his case.
>
> [138] However, it is settled law that when a case rests on **circumstantial evidence**, such **evidence** must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused/the other party. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt (see *Chandmal & Anor v. State of Rajasthan* AIR [1970] SC 917, quoted with approval in the case of *Lim Hean Chong v. PP* [2012] 2 CLJ 1046 (CA)).

[139] In the case of *Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the Ship or Vessel "Normar Splendour"* [1999] 6 MLJ 652 (cited by learned counsel for the 3rd and 4th Defendants) the Court explains the value of **circumstantial evidence** in the following manner:

> Now, in regard to the value of **circumstantial evidence** of which the telexes can be categorised as such, reference to the case of *Bakshish Singh v. The State of Punjab* AIR 1971 SC 2016, a decision on the Indian Supreme Court, must be made. In that case, KS Hedge J in a short judgment had this to say at p. 2018 of the report:
>
> The law relating to **circumstantial evidence** has been stated by this court in numerous decisions. It is needless to refer to them as the law on the point is well settled. In a case resting on **circumstantial evidence**, the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of **evidence** so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. (emphasis added)

(ii) the following passages from the Federal Court's judgment in *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195:

> It was also contended that the learned trial Judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial Judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such as, for example – 'Was it an accident?'.
>
> The second passage is as follows:
>
> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is:

A where does the totality of them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or in there some other reasonably possible explanation of those facts?

B The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.

C In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

(iii) paragraphs [63] to [70] of the judgment of Azizul Azmi Adnan JC (as he then was) in *Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor* [2016] 1 LNS 884; [2016] 12 MLJ 251 reproduced below:

D [63] The distinction between **circumstantial evidence** and direct evidence and the proper treatment of **circumstantial evidence** is explained in the following passage of the judgment of Visu Sinnadurai J in *Public Prosecutor v. Sarjit Kaur alp Najar Singh* [1998] 1 MLJ 184:

E > **Circumstantial evidence** is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of **circumstantial evidence** are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.

F The law on **circumstantial evidence** is stated by the learned editors of *Blackstone's Criminal Practice 1991* at pp 1674-1675 as follows:

> **Circumstantial evidence** is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts
G in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. **Circumstantial evidence** is evidence of relevant facts, ie, facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to **circumstantial evidence**
H will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of **circumstantial evidence**, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

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The learned editors point out further:

> **Circumstantial evidence** 'works by cumulatively, in geometrical progression, eliminating other possibilities' (*Director of Public Prosecutions v. Kilbourne* [1973] 1 AC 729. per Lord Simon at p. 758). Pollock CB, likening **circumstantial evidence** to a rope comprised of several cords, said:
>
> > One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus, it may be in **circumstantial evidence** that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (*Exall* (1866) 4 F & F 922 at p 929).
>
> However, although **circumstantial evidence** may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:
>
> > It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v. The Queen* [1952] AC 480, per Lord Normand at p 489).
>
> Nonetheless, there is no requirement, in cases in which the prosecution's case is based on **circumstantial evidence**, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v. Director of Public Prosecutions* [19731 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where **circumstantial evidence** is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

> ... to remember only that the prosecution need to prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, ... in a case depending on **circumstantial evidence**. It is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts

proved irresistibly point to one and only one conclusion, namely the accused's guilt (per Suffian LP in *Jayaraman & Ors v. PP* [1982] 2 MLJ 306 at p 310).

[64] To summarise: **circumstantial evidence** is evidence of the circumstances surrounding an event from which a fact in issue may be inferred, whereas direct evidence is evidence of the fact in issue itself. In evaluating **circumstantial evidence**, it is no longer necessary for a court to ask itself the question whether the evidence is inconsistent with any other conclusion or hypothesis: see the *dicta* of Mohd Azmi FCJ in *Ng Thian Soong v. Public Prosecutor* [1990] 2 MLJ 148. Of course the present case was not criminal in nature, and therefore, following *Sinnaiyah & Sons Sdn Bhd v. Damai Setia* Sdn Bhd [2015] 7 CLJ 584; [2015] 5 MLJ 1, the applicable standard of proof is on a balance of probabilities.

[65] Two related facts in issue that must be proven by the plaintiff are, firstly, the existence of a profit sharing arrangement and secondly, receipt by the defendants of money out of such profit sharing arrangement. In the event that the plaintiff fails to prove either of these facts on a balance of probabilities, its case must necessarily fail.

[66] In my judgment, the reward spreadsheets were direct evidence of the existence of a profit sharing arrangement. The plaintiff has demonstrated that there were items in the reward spreadsheets that could be directly linked to specific purchase orders and invoices relating to the purchase of IT-related equipment by the plaintiff.

[67] However, in relation to the issue of whether the defendants had received any money or other gratification from the profit sharing arrangement, the reward spreadsheets are merely **circumstantial evidence**, as they require the court to draw an inference that the sums set out in the spreadsheets had in fact been paid to the defendants.

[68] The other items of circumstantial evidence operating in favour of the plaintiff include:

(a) by the joint purchases of the Lorong Midah and Safaris properties, it was established that the defendants had an undisclosed relationship of a pecuniary nature with Ho Yew Fai and Foo Kok Kee, the directors and shareholders of iConnect2 and Gallant Mark. These companies were registered vendors to the plaintiff. Although the existence of this undisclosed pecuniary relationship does not of itself prove the existence of the profit sharing arrangement, it does go towards supporting the contentions of the plaintiff by the fact that there had been a prior commercial arrangement between the parties involved;

(b) the persons identified as 'kh', 'ct' and 'con' in the reward spreadsheets corresponded to Ho Yew Fai (who was also known as Kenneth Ho), Wong Chin Tat and Con Kostanti respectively. Wong Chin Tat was a general manager and former director of iConnect2. It will be recalled that Con Kostanti was, at the material time, an employee of Tabcorp. Like iConnect2 and Gallant Mark, Tabcorp was a registered supplier to the plaintiff and was regularly called upon to provide quotes for the procurement of IT-related equipment by the plaintiff;

(c) the share buyback spreadsheets (see para 44(c) *ante*) suggested that the defendants were given a notional shareholding in Gallant Mark and Elegant Distribution, based on which profit distributions were made to the defendants;

(d) the investment spreadsheets (see para 44(b) *ante*) purported to show investments that had been made by the first defendant into Gallant Mark, Elegant Distribution and iConnect2, into real property and listed shares, as well as investments held in fixed deposits, in bank accounts and held at the Employee Provident Fund;

(e) a web-based email (B14/1702) that had been retrieved from the primary hard disk showed a discussion between Con Kostanti and the first defendant regarding profits that had been allocated to the former, and

(f) there were funds transfer receipts that were recovered after the dismissal of the first defendant from his former office. These receipts showed:

(i) the transfer of AUD7,000 from Ho Yew Fai to Con Kostanti; and

(ii) the transfers of funds on two separate occasions in the amounts of more than AUD3,000 and AUD4,000 from the first defendant to Con Kostanti.

There was also receipts showing transfers by the first defendant to his own account held in a bank in Singapore, but I did not consider these relevant for the purposes of establishing the plaintiff's case.

[69] Against these items of evidence were the following considerations:

(a) although there were instances where the reward spreadsheets could be matched to specific transactions that had been undertaken by the plaintiff, there were also other reward spreadsheets retrieved from the primary hard disk that were not capable of being perfectly matched to any specific purchase order, invoice or payment. That this was

so is established by the fact that the original statement of claim cited 127 transactions that were the subject of the plaintiff's claim. The statement of claim was subsequently amended to only refer to the 65 incidences of 'perfect matches';

(b) there was no direct evidence that either defendant had received funds that would be traced back to any of Ho Yew Fai, Foo Kok Kee, Wong Chin Tat, iConnect2, Gallant Mark or Elegant Distribution. Although evidence was led regarding the bank account statements of the defendants, none of the payments into such accounts were shown to have corresponded to any particular instance where it was alleged that profits from a transaction involving the purchase of IT-related equipment by the plaintiff were shared with the defendants; and

(c) the existence of a secret profit arrangement by itself would also be insufficient for the plaintiff to succeed in its claim. The plaintiff must also show that the defendants and the relevant third parties had received the profits. In my view, the only documents that went towards proving that the defendants had received secret profits were the reward spreadsheets, and even here the evidence was circumstantial. The reward spreadsheets are **circumstantial evidence** because they require the court to infer that the sums set out against the names of the persons in the reward spreadsheets had been paid to such persons. They do not constitute direct evidence of receipt of the secret profits. There was no other document that was capable of proving receipt of funds.

[70] Having evaluated the evidence as a whole, I came to the view that the evidence before this court was not capable of proving, on a balance of probabilities, that there existed a profit sharing arrangement between the defendants and the third parties identified in the reward spreadsheets or that the defendants and I or such third parties had received the amounts stated in the spreadsheets. For this reason, I dismissed the plaintiff's prayers for relief. (emphasis added)

(iv) passages from *Sarkar's Law of Evidence*, 15th edn, Reprint 2004, vol. 1 at pp. 62 to 64 the relevant parts whereof are reproduced below:

Criminal Appeals. (See post s. 5; 'Criminal Appeal')

Circumstantial Evidence – All judicial evidence is either direct or circumstantial. By 'direct evidence' is meant when the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents. To all other forms, the term 'circumstantial evidence' is applied; which may be defined, that modification of indirect evidence, whether by witnesses, things or documents,

which the law deems sufficiently proximate to a principal fact or *factum probandum* to be receivable as evidentiary of it. And this also is of two kinds-conclusive and presumptive: 'conclusive' when the connection between the principal and evidentiary facts-the *factum probandum* and *factum probans* – is a necessary consequence of the laws of Nature; 'presumptive' when the inference of the principal fact from the evidentiary is only probable, whatever be the degree of persuasion which it may generate [*Best*, 11th Ed s. 293). Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence [*R v. Ali Cassim*, 4 Bur LT 97]. Evidence which proves or tends to prove the *factum probandum* indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other '*facts probantia*' it is called circumstantial evidence [*Chakuna Orang v. State of Assam*, 1981 Cri LJ 1661, 1662 (*Gauhati*)]. Authorship of a document can be proved like any other fact, by both direct as well as circumstantial evidence [*J.D. Aggarwal v. State*, 1983 Cri LU NOC 155 (Delhi): 1983 1 Crimes 1083].

Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact [*Wills: Cir Ev* 6th Ed p 6].

-Tests- It is well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

In *Brijlal Prasad Sinha v. State of Bihar* (1998) 4 Scale 25 at 35 (SC) Pattanaik J of the Supreme Court reiterated the same approach and said: "In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains *res integra* and it has been held by *catena* of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the

basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused." See also *State of UP v. Nahar Singh*, 1998 Cri LJ 2006 (SC), where the circumstantial evidence was of clinching nature. To the same effect *Manik Bandu Gawati v. State of Maharashtra* 1998 Cri LJ 2246 (Bom-DB).

[7] In *PP v. Cheah Chong Tatt & Anor*, a case where there was no eyewitness as to the identities of the offenders of the armed robbery, the High Court held that from the 13 pieces of circumstantial evidence viewed together, they all pointed to the irresistible conclusion that Hafizuddin committed the armed robbery and that the circumstantial evidence, including Cheah's leading the police to a sizeable amount of money in his girlfriend's and parents' house, also established Cheah's abetting of the armed robbery. In *Sunny Ang v. PP* (*supra*), a case where there was no eyewitness to the commission of the murder, the Federal Court upheld the trial judge's decision that the cumulative effect of all the circumstantial evidence led to the irresistible conclusion that it was the accused who committed the crime of murder. *Hamzah bin Abdul Majid v. Mohd Jalani bin Datuk Hj Mohd Sidek & Ors* (*supra*) was a civil suit wherein the main claim of the plaintiff was for a declaration that he was the rightful owner of all the shares in a company which he had acquired under an agreement signed between him and the shareholders of the company, for reliefs and damages arising from the tort of conspiracy to injure and for related reliefs. In dealing with the issue as to whether the circumstantial evidence supported the truth or otherwise of the statutory declaration of a witness, the learned judge quoted the *dicta* of judges on circumstantial evidence which I have reproduced in sub-para. 6(i) above. The learned judge held in para. [156] that the circumstantial evidence was contradicted by documentary evidence and was also convincingly rebutted by cross-examination, and therefore could not be relied upon to establish the fact sought to be proven. In *Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor* (*supra*), the High Court was dealing with a civil suit as to whether the employees of a company were in breach of express or implied terms of employment contract by entering into unlawful profit sharing arrangement with vendors who supplied goods and services to the company. The company relied partly on circumstantial evidence to prove the existence of profit sharing arrangement between the employees and the vendors. The High Court held that the standard of proof required was on a balance of probabilities and on that basis dismissed the plaintiff's prayers: see para. [70].

The legal principles that can be gleaned from the above-mentioned decided authorities and the learned treatise *Sarkar's Law of Evidence* can be summarised as follows:

(i) where a plaintiff in a civil suit relies entirely on circumstantial evidence to prove the identity of the tortfesor in a case where the defendant has denied he was the person who committed the tort complained of, the standard of proof required for proving that the identity of the tortfeasor who committed the tort is the defendant is that of "irresistible conclusion"; and

(ii) where a plaintiff in a civil suit relies wholly or partly on circumstantial evidence to prove an element of the tort complained of (other than for establishing the identity of the tortfeasor), the standard of proof is that of a balance of probabilities.

[8] However, the passages referred to by the appellant's counsel from the Court of Appeal's judgment in *YB Dato' Hj Husam Hj Musa v. Mohd Faisal Rohban Ahmad* [2015] 1 CLJ 787; [2015] 3 MLJ 364 seem to pose a further complication to the question of circumstantial evidence as to the identity of tortfeasor. In *YB Dato' Hj Husam Hj Musa*'s case (*supra*), the Court of Appeal held that the evidence in that case stood as strong circumstantial evidence which proved that the defendant was the blogger who published the defamatory material on his blog although the defendant has denied ownership of the blogspot and has further denied his authorship of the impugned article in the blog. In that case, the Court of Appeal did not refer to or discuss any of the decided authorities cited in paras. 4 and 6(i) to 6(iv) above, and did not specifically require that the identity of the tortfeasor be proved to the extent of "irresistible conclusion" test.

[9] It is trite law that all judgments must be read in the light of the factual context of the case before the courts and should not be read in the abstract. "Every judgment of the court must be read as governed by the facts of the case": see *Quinn v. Leathem* [1901] AC 495 at p. 506. Every case is decided on its own facts and must be read accordingly: per Viscount Simon in *Harris v. DPP* [1952] 1 All ER 1044 at p. 1050D. "All judgment under the common law system must be understood *secundum subjectectum materiam*: judges, in pronouncing principles, have in mind the characteristics present in the case, which characteristics may be absent in other cases": per Lord Diplock in *Mutual Life & Citizens' Assurance Company Ltd & Another v. Clive Raleigh Evatt* [1971] AC 793, at p. 802D-F.

[10] Read in the factual context of the case in *YB Dato' Hj Husam Hj Musa*, the Court of Appeal in that case made a decision on the legal effect of the new s. 114A of the Evidence Act 1950 ("Evidence Act") on the facts of that case. The new s. 114A of the Evidence Act was enacted to overcome the evidential difficulty of proving the identity of owners or managers of blogs and websites in the internet or multimedia through the old, traditional evidential proof. This the Legislature *vide* the new s. 114A of the Evidence Act achieved by enacting statutory presumptions of website or blogspot

ownership or authorship in certain specified circumstances. These statutorily specified circumstances, which give rise to presumption of ownership or authorship are:

(i) if the name, photograph or pseudonym appeared in a publication, depicting the said person to have some connection with the publication, the said person was presumed to have published or re-published the contents of the publication;

(ii) if a publication originates from a network service that a person has registered, the said person is presumed to have published or re-published the contents of the publication; and

(iii) if a publication originates from a computer which a person has custody or control of, the said person is presumed to have published or re-published the contents of the publication.

In *YB Dato' Hj Husam Hj Musa*'s case, the Court of Appeal held that on the evidence which was admissible and which ought to have been considered by the court, the case fell within a statutory presumption under s. 114A of the Evidence Act, and therefore, the plaintiff has established that the identity of the tortfeasor was the defendant.

[11] The facts in our present appeal are materially different from those of *Dato' Hj Husam Hj Musa*'s case. In our present appeal, the impugned defamatory materials are physical posters and are not contained in any website, blogpost or any internet source. In the circumstances of the present appeal the plaintiff here cannot call in aid any of the statutory presumptions in s. 114A of the Evidence Act.

[12] In the premises, I hold that the appellant/plaintiff in the present appeal has to prove the identity of the tortfeasor of the anonymous publication according to the traditional principles and rules of evidence laid down in the decided cases cited in paras. 4 and 6 above.

[13] The test of proof of identity of tortfeasor in a case where the defendant has denied his involvement whatsoever and the plaintiff is entirely relying upon circumstantial evidence to establish the identity of the tortfeasor is that of "irresistible conclusion", except in a situation where a statute expressly provides to the contrary, such as the presumptions under s. 114A of the Evidence Act applies. This is consistent with and following from *Sarkar's Law of Evidence*, the Indian Supreme Court in *Brijlal Prasad Sinha v. State of Bihar* [1998] 4 Scale 25, Mohamed Zaini Mazlan JC (as he then was) in *PP v. Cheah Chong Tatt*, Lim Yee Lan J (later JCA) in *Hamzah Abdul Majid v. Mohd Jalani Datuk Hj Mohd Sidek & Ors* and the Federal Court in *Sunny Ang v. PP*.

[14] In the premises I hold that the plaintiff, who relies entirely on circumstantial evidence to establish the identity of the tortfeasor in a case where the defendants have denied their involvement whatsoever and s. 114A of the Evidence Act is not applicable, has to prove the following three elements of "irresistible conclusion" test in order to establish the identity of the tortfeasor by circumstantial evidence:

(i) the circumstances from which an inference of commission of tort is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the commission of the tort by the defendant; and

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the tort was committed by the defendant and none else.

Although some other decided authorities used slightly different words to describe the requirement of proof of identity of the offender or tortfeasor in cases of entire reliance on circumstantial evidence, they in practice operate to the same effect as the requirement of "irresistible conclusion". The other slightly different verbal description of the "irresistible conclusion" are:

(i) the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused: Indian Supreme Court in *Brijlal Prasad Sinha v. State of Bihar* (*supra*);

(ii) Lord Cairns in *Belhaven & Stenton Peerage* (*supra*) where His Lordship stated: "My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of which insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel";

(iii) "... those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a

A conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused": *Asia Pacific Parcel Tankers Pte Ltd v. The Owners Of The Ship Or Vessel "Normar Splendour"*;

B (iv) the circumstances ... when pieced together, similar to pieces of a jigsaw puzzle being assembled, it provides a complete picture. This picture must point towards the guilt of the accused: see Mohamed Zaini Mazlan JC (as he then was) in *PP v. Cheah Chong Tatt & Anor* (*supra*).

[15] In my considered view, there is much wisdom, logic and good sense C behind the requirement of irresistible conclusion test for establishing the identity of tortfeasor in a case where the plaintiff entirely relies on circumstantial evidence to prove the identity of the tortfeasor but the defendant has testified in court to deny his involvement in the commission of the tortious act complained of. To hold a defendant in such case as the tortfeasor on merely a balance of probabilities would entail a risk that some D defendants in similar cases may probably be mistakenly held liable for torts which they did not commit. This is because the balance of probabilities serves to weigh between two factual versions or propositions so as to determine which factual version or proposition is more probable and which factual version or proposition is less probable. What is less probable does not E mean it would never occur in real life situations, but it merely means that it is less probable or less likely to have occurred in comparison with the more probable factual version or proposition. When applied to establish the identity of tortfeasor in the absence of any direct evidence on identity of the tortfeasor, the risk of mistaken identity of the tortfeasor has to be avoided F by requiring the higher threshold of "irresistible conclusion". In my considered view, it is better in the interest of the administration of justice to require the plaintiff (who seeks the assistance of the court to obtain damages and compensation against the defendant whom the plaintiff alleges as the tortfeasor) to establish his case on identity of the tortfeasor on entirely circumstantial evidence by the higher threshold of "irresistible conclusion" G than to allow the court to be saddled with the risk of punishing the defendant (who has been testified to deny his involvement in the tortious act complained of) for an alleged tortious wrong which he has not committed.

[16] Now I shall come to the evidence in the present appeal to assess and H determine whether or not the appellant here has discharged his burden of proving that the respondents were the tortfeasors based on the circumstantial evidence adduced in this case.

[17] The circumstances relevant to this issue of identity of tortfeasor in the present case are summarised below:

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(i) the appellant/plaintiff through his law firm Messrs Cross & Associates was at the material times acting as solicitor for his clients MIC Caddies in Shah Alam Sessions Court Suit No. 2-252-2691-2007 wherein MIC Caddies was claiming for monetary damages against Kelab Golf Negara Subang;

(ii) on 8 May 2009 MIC Caddies through the efforts of the appellant/plaintiff obtained judgment against the golf club for RM205,000 plus interest thereon at 8% as from 16 June 2004;

(iii) the golf club filed an appeal against the judgment delivered by the Sessions Court;

(iv) by letter dated 16 November 2009 the golf club's solicitors stated that MIC Caddies' General Manager Mr Michael Nathan had signed letter dated 25 August 2009 agreeing to settle the matter for RM45,000 and enclosed the golf club's cheque for RM45,000;

(v) in reply thereto, Messrs Cross & Associates said that Michael Nathan had no authority to negotiate or agree to any settlement on behalf of MIC Caddies;

(vi) by Messrs Cross & Associates' letter dated 24 December 2009 the appellant/plaintiff notified MIC Caddies of having received the settlement cheque of RM300,000 and also enclosed an invoice of RM94,000 for legal professional services rendered and held back the balance pending further appeal. In successfully obtaining the judgment sum of RM300,000, the plaintiff has performed professionally and diligently as an advocate and solicitor who advocated for the best interest of his clients;

(vii) on 8 February 2012, the first respondent/defendant Mr Ganesan on behalf of MIC Caddies lodged a police report complaining against the appellant/plaintiff's refusal to release payment to MIC Caddies (appeal record, Part C, p. 104);

(viii) at the appellant/plaintiff's insistence MIC Caddies signed indemnity agreement dated 20 February 2012 to indemnify and save harmless the appellant/plaintiff from any claim, action, liability, loss, damage or suit or report or complaint arising from the release of the judgment sum after deduction of the professional fees and charges in respect of the Sessions Court case (appeal record, Part C, pp. 19 to 23). This indemnity agreement was signed by Muhammad Al-Almin Omar, Saharudin Awang Kechik and V Ganesan (ie, the first defendant) as Directors and/or Representatives of MIC Caddies Sdn Bhd. This rather unusual indemnity agreement which the plaintiff insisted on taking from his clients turn out to be a trigger for several unhappy events subsequently;

(ix) in early 2014, the first defendant Ganesan lodged a complaint with Advocates & Solicitors Disciplinary Board against the plaintiff in connection with the latter's handling of the judgment sum and fees;

(x) by letter dated 6 November 2014 signed by Encik Sulaiman bin Mohd Radzi in his capacity as the President of National Association of Caddies Malaysia, the association complained to the Catholic Lawyers Society Kuala Lumpur against the plaintiff in connection with the handling of the court case and judgment sum;

(xi) the respondents/defendants were at the material times directors or office bearers of MIC Caddies;

(xii) the appellant/plaintiff did not see the person who prepared or put up the impugned posters;

(xiii) no eyewitness has been called to testify at the trial regarding the identity of the person who prepared or put up the impugned posters;

(xiv) MIC Caddies, the appellant/plaintiff's clients, were unhappy with the appellant/plaintiff's handling of the court case and withholding of the judgment sum for many months;

(xv) on behalf of MIC Caddies, the following persons made written complaints against the appellant/plaintiff:

(a) one Encik Sulaiman bin Mohd Radzi, in his capacity as the Chairman of MIC Caddies, lodged a written complaint with the Catholic Lawyers Society Kuala Lumpur against the plaintiff; and

(b) the first defendant, who lodged a police report against the plaintiff and also signed the indemnity agreement.

(xvi) in the course of the proceeding, the plaintiff served notice to produce a second police report, but this police report was not produced by the defendants. However, there is no evidence to show that the defendants were specifically forewarned of adverse inference to be drawn if they failed or neglected to produce the police report, and there was no cross-examination to challenge the defendants for the failure or neglect to produce the said police report; and

(xvii) in the course of the trial, there was some general evidence to indicate that the second defendant had some knowledge about the plaintiff's background but there is no evidence that the other directors or office bearers or complainants had no knowledge about the plaintiff's background.

[18] From the facts and evidence as summarised in sub-paras. 17(i) to 17(xvii) above, the following persons probably have motive or some seeming reason to injure the plaintiff's reputation by publishing or causing to be published defamatory posters regarding the plaintiff: A

(i) one Encik Sulaiman bin Mohd Radzi, who lodged a written complaint on behalf of the caddies association against the plaintiff; B

(ii) the first defendant Ganesan, who lodged a police report against the plaintiff, signed the board resolution to authorise the signing of the indemnity agreement dated 20 February 2012 and also signed the indemnity agreement in favour of the plaintiff as a pre-requisite by the plaintiff for the release of the judgment sum to MIC Caddies; C

(iii) the second defendant Michael Nathan, who purportedly attempted to settle the case for much lesser sum but was refuted by the plaintiff; and

(iv) Muhammad Al-Almin Omar and Saharudin Awang Kechik, the other board members of MIC Caddies who signed the board resolution to authorise the signing of the indemnity agreement dated 20 February 2012 and also signed the indemnity agreement in favour of the plaintiff as a pre-requisite by the plaintiff for the release of the judgment sum to MIC Caddies. D

[19] While there are items of the circumstantial evidence which point towards the first defendant and the second defendant as the likely persons who published or caused to be published the defamatory posters, there are also items of circumstantial evidence which point towards persons other than the first and second defendants as the likely persons who published or caused to be published the defamatory posters. E F

[20] In our present case, none of Encik Sulaiman bin Mohd Radzi and the relevant signatories (who signed the board resolution authorising the signing of the indemnity agreement in favour of the plaintiff) was cited as a co-defendant, nor was any of them called or subpoenaed to testify in the court. In the absence of these other persons' evidence to deny their involvement in the impugned publication or to put the blame onto the first and second defendants, the items of circumstantial evidence did not point wholly or predominantly towards the single conclusion of the guilt of the first and second defendants. G H

[21] Applying the test stated by *Sarkar's Law of Evidence*, I find and conclude that the circumstances in our present case are not of a definite tendency unerringly pointing towards the culpability of the first and second defendants, and that the circumstances, taken cumulatively, do not form a chain so complete that there is no escape from the conclusion that within all human probability the tort of defamation was committed by the defendants I

A and none else. Adopting the language used by Lord Cairns in *Belhaven & Stenton Peerage* the rays of circumstantial evidence in our present case have fallen short of the requirements of "a number of rays, each of which insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away
B the darkness which you are endeavouring to dispel". The circumstances did not form a complete picture which must point towards the first and second defendants as the persons who published or caused to be published the defamatory posters: see the judgment of Mohamed Zaini Mazlan JC (as he then was) in *PP v. Cheah Chong Tatt & Anor*. Following the criterion laid
C down by the Federal Court in *Sunny Ang v. PP*, I find that the cumulative effect of all the evidence does not lead to the irresistible conclusion that it was the first and second defendants who committed this tort of defamation.

[22] It is probably pertinent for this court to express its view that anonymous publication of defamatory materials such as what has happened
D in our present case is an abominable mischief which will not be received with leniency in cases where the identities of the culprits are established according to the requirements of law. Any person who has honest belief or legitimate basis to make a statement regarding another person should have the courage of owning up to the act by identifying himself or herself as the maker of such
E statement. Anonymous defamatory materials can be considered as actuated by malice or bad faith or with intent to injure, and when the tortfeasor is found according to the requirements of law, the court should not hesitate to penalise such tortfeasor with very substantial amounts of exemplary damages and/or aggravated damages.

F **[23]** Under the existing state of the laws, a plaintiff, who is aggrieved by anonymous defamatory publications but who cannot call in aid the statutory presumption in s. 114A of the Evidence Act, has to, in consultation with his solicitors, carefully scrutinise all the items of circumstantial evidence of the case and objectively analyse the identities of the probable persons who are
G the likely tortfeasors, and thereafter seriously consider whether to include all such probable persons as co-defendants in the suit or to cite several of them as co-defendants while calling or subpoenaing the other such persons as witnesses. A plaintiff who pursues his suit without doing either of the above courses of proceedings would face the risk of being unable to prove his case on identity of tortfeasor according to the test of "irresistible conclusion"
H required by law. On the other hand, a plaintiff who has included some co-defendants who are eventually exculpated by the court may probably seek a remedy in costs by way of *Bullocks* order of costs or *Sanderson* order of costs in order to eventually pass the burden of costs of the exculpated co-defendants to the defendants who are held to be the tortfeasors.

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[24] In the course of the appellant's submissions, the appellant has also argued that the learned Sessions Court Judge has not delve into the law and the specific details of evidence in her grounds of judgment. As this court has come to the same conclusion and decision as the Sessions Court after having discussed and applied the legal principles to the facts and circumstances of the present case, it is unnecessary for this court to elaborate further into the details of such arguments against the Sessions Court's grounds of judgment.

[25] In the entire circumstances, this court finds and conclude that the learned Sessions Court Judge was correct in dismissing the plaintiff's claim in the action. In the premises, the appellant's appeal is dismissed with costs. After hearing both parties' counsel on the quantum of costs on 28 May 2020, this court has also ordered the appellant to pay RM3,000 as costs to the respondents, subject to allocatur.